

MEMORANDUM OF AGREEMENT BETWEEN  
THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGARDING  
SUBMISSION OF TOTAL MAXIMUM DAILY LOADS FOR BIOLOGICALLY IMPAIRED  
WATERS PURSUANT TO SECTION 303(d) OF THE CLEAN WATER ACT,  
33 U.S.C. § 1313(d)

WHEREAS, the West Virginia Department of Environmental Protection (WVDEP) has identified on its 1998, 2002, 2004, 2006, 2008, and 2010 lists of water quality limited segments (also called “impaired waters”) prepared and submitted to EPA pursuant to Section 303(d) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1313(d), waters that are biologically impaired, that is, waters that are not achieving West Virginia’s narrative water quality criteria as applied to aquatic life and as codified at W. Va. Code R. § 47-2-3.2, 3.2.e, and 3.2.i. To make these identifications, WVDEP used either EPA’s 1989 *Rapid Bioassessment Protocols for Use in Streams and Rivers: Benthic Macroinvertebrates and Fish* or the West Virginia Stream Condition Index (WVSCI), and EPA has identified biologically impaired waters on West Virginia’s 2012 Section 303(d) list using WVSCI; and

WHEREAS, since 2004, WVDEP has established over 4,000 TMDLs for impaired waters in West Virginia. These include approximately 936 TMDLs addressing biological impairment since 2005, including approximately 362 TMDLs addressing waters identified as biologically impaired on West Virginia’s 2012 Section 303(d) list; and

WHEREAS, on February 14, 2017, the U.S. District Court for the Southern District of West Virginia held that West Virginia had “constructively submitted” “no” TMDLs for 573 biologically impaired waters identified in Appendix A and Appendix B to the Second Amended Complaint and directed EPA to approve or disapprove West Virginia’s “constructive submission.” *Ohio Valley Environmental Coalition, et al., v. Pruitt, et al.*, Case No. 3:15-cv-00271 (S.D.W. Va. Feb. 14, 2017); and

WHEREAS, the district court has directed EPA to comply with its February 14, 2017 order no later than June 13, 2017; and

WHEREAS, EPA has appealed the district court’s February 14, 2017 decision and order to the U.S. Court of Appeals for the Fourth Circuit, but has been unable to obtain a stay of the district court’s order during the pendency of the appeal; and

WHEREAS, EPA and WVDEP recognize that, absent a stay or successful appeal, EPA is compelled by the district court’s order to take action; and

WHEREAS, EPA and WVDEP agree that it is consistent with Section 101(b) of the CWA, 33 U.S.C. § 1311(b), and in the best interest of the citizens of West Virginia that WVDEP establish TMDLs for West Virginia’s waters;

NOW THEREFORE, EPA AND WVDEP HAVE PREPARED THIS MEMORANDUM OF AGREEMENT (MOA) AND AGREE AS FOLLOWS:

1. WVDEP recognizes that it has an obligation under the CWA to establish and submit to EPA for approval or disapproval TMDLs that address all impairments identified on West Virginia's Section 303(d) list, including biological impairments. WVDEP agrees that there is no impediment under current West Virginia law that would preclude WVDEP's ability to meet the commitments in this MOA.
2. WVDEP will establish and submit to EPA TMDLs for all waters identified in Appendices A and B of the Second Amended Complaint filed in *Ohio Valley Environmental Coalition, et al., v. Pruitt, et al.*, Case No. 3:15-cv-00271 on the following schedule, (except for waters for which TMDLs have been submitted and approved by EPA that address all causes of biological impairment and except for biological impairments that are removed from West Virginia's Section 303(d) list, so long as the removal of such impairment(s) is approved by EPA):
  - a. EPA and WVDEP recognize that WVDEP has submitted and EPA has approved the 2014 Section 303(d) list, which removed 6 waters previously identified as impaired on the 2012 Section 303(d) list because they are no longer impaired, which are listed in Attachment A to this agreement.
  - b. EPA and WVDEP recognize that WVDEP has submitted and EPA has approved TMDLs that address all causes of biological impairments for 100 waters identified on West Virginia's 2012 Section 303(d) list, which are listed in Attachment B to this Agreement.
  - c. WVDEP is working toward establishing TMDLs addressing the causes of biological impairments in 150 waters identified in Attachment C to this Agreement. WVDEP will submit TMDLs addressing the biological impairments for these 150 waters no later than December 31, 2021.
  - d. For the remaining biologically impaired waters identified in Attachment D to this Agreement, within 30 days of execution of this MOA, WVDEP and EPA will sign an addendum to this MOA containing a schedule with date-specific deadlines for submittal by WVDEP to EPA of TMDLs addressing all causes of biological impairments, including for ionic toxicity where relevant to a particular water. The schedule will specify interim milestones specifying the number of TMDLs to be completed on a regular basis (e.g., annually or biannually) that ensures balanced and steady progress towards completion of TMDLs addressing all causes of biological impairments, including ionic toxicity, for all of the waters on Attachment D, with all of the TMDLs to be completed no later than June 30, 2026. As WVDEP begins TMDL development work in each watershed, WVDEP will submit to EPA a status report describing its plans for conducting the technical work necessary to develop and submit TMDLs for the causes of biological impairment in the Attachment D waters in that watershed in accordance with the schedule.

3. WVDEP will incorporate the schedule set forth in Paragraph 2 into its priority ranking and schedule as part of its 2018 Section 303(d) list of impaired waters and in all future Section 303(d) lists until termination of this MOA. EPA and WVDEP acknowledge that WVDEP's priority ranking historically has been based in large part on its Watershed Management Framework. In addition, WVDEP historically has taken a watershed approach and attempted to develop at one time TMDLs addressing as many impairments and pollutants within a watershed as possible. EPA and WVDEP recognize, however, that, in order to complete TMDLs in accordance with the schedule set forth in Paragraph 2, WVDEP temporarily may need to depart from its Watershed Management Framework approach and may need to limit TMDL development within a particular watershed solely to addressing all causes of the biological impairments identified in Attachments C and D. EPA recommends and WVDEP intends that WVDEP return to its Watershed Management Framework and watershed approach to TMDL development upon termination of this MOA.
4. EPA will exercise every reasonable effort to assist WVDEP's efforts to establish TMDLs consistent with this MOA by leveraging funding and/or technical support on an annual basis consistent with applicable law and Paragraph 8 below.
5. By enacting SB 562 (codified at W. Va. Code § 22-11-7b), which Code section was again amended during the 2017 Regular Session by SB 687, the West Virginia Legislature directed that:

The [WVDEP] secretary shall propose rules measuring compliance with the aquatic life component of West Virginia's narrative water quality standard requiring evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (ii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present. The secretary shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code that implement the provisions of this subsection. Rules promulgated pursuant to this subsection may not establish measurements for biologic components of West Virginia's narrative water quality standards that would establish standards less protective than legislatively-approved rules that existed at the time of enactment of the amendments to this subsection by the Legislature during the 2012 regular session.

WVDEP has been communicating with EPA regarding its efforts to comply with SB 562, including retaining West Virginia University to develop a metric to measure the fish population and data collection. WVDEP continues to collect additional fish data to complete its methodology. Nothing herein should be construed as an endorsement by EPA of any methodology that may be developed in the future by WVDEP pursuant to SB 562.

6. Regardless of whether WVDEP has developed the new methodology contemplated by SB 562, WVDEP shall establish TMDLs, including ionic stress TMDLs, in accordance with the schedule set forth in Paragraph 2 and the addendum referenced in Paragraph 2.
7. Based upon WVDEP's commitment to establish and submit TMDLs that address the causes of all biological impairments consistent with the schedule set forth in Paragraph 2 of this MOA, EPA intends to conditionally approve WVDEP's "constructive submission" of "no" TMDLs for the waters identified in Attachments C and D as found by the district court in its February 14, 2017 order. In the event that WVDEP fails to submit a TMDL or TMDLs in accordance with the schedule set forth in Paragraph 2, EPA's approval without further process, and by operation of this agreement, will be rescinded and replaced by disapproval of the "constructive submission" of "no" TMDLs for the particular water(s) for which WVDEP fails to submit a TMDLs in accordance with the schedule as of the date set forth in the schedule.
8. This document does not create any right or benefit, substantive or procedural, enforceable by law or equity against EPA or WVDEP or any of their officers, employees, or other representatives or any person. The statutes and regulations referenced herein contain legally binding requirements, and this document does not substitute for those statutes and regulations, nor is this document itself a regulation. As required by the Antideficiency Act, 31 U.S.C. §§ 1341 and 1342, all commitments made by EPA herein are subject to the availability of appropriated funds. Nothing in this document in and of itself obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. This document does not create any exemption from policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this document will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.
9. All commitments made by WVDEP in this agreement are subject to West Virginia law concerning appropriations. Nothing in this agreement requires WVDEP to expend funds in violation of West Virginia law.
10. This MOA may be signed in counterparts.


*Memorandum of Agreement Between the West Virginia Department of Environmental Protection and the United States Environmental Protection Agency Regarding Submission of Total Maximum Daily Loads for Biologically Impaired Waters Pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d)*

11. This MOA will terminate upon the earlier of (1) completion and submission to EPA of all TMDLs addressing the cause(s) of biological impairment in the waters identified in Attachments C and D or (2) a judicial decision that relieves EPA of the obligations contained in the district court's February 14, 2017 order in *OVEC v. Pruitt*, Case No. 3:15-cv-00271.

**JUN 13 2017**

Signed this \_\_\_\_\_ of June, 2017.

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Austin Caperton  
Cabinet Secretary  
West Virginia Department of  
Environmental Protection

  
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E. Scott Pruitt  
Administrator  
United States Environmental  
Protection Agency

*Memorandum of Agreement Between the West Virginia Department of Environmental Protection and the United States Environmental Protection Agency Regarding Submission of Total Maximum Daily Loads for Biologically Impaired Waters Pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d)*

11. This MOA will terminate upon the earlier of (1) completion and submission to EPA of all TMDLs addressing the cause(s) of biological impairment in the waters identified in Attachments C and D or (2) a judicial decision that relieves EPA of the obligations contained in the district court's February 14, 2017 order in *OVEC v. Pruitt*, Case No. 3:15-cv-00271.

Signed this 13<sup>TH</sup> DAY of June, 2017.



Austin Caperton  
Cabinet Secretary  
West Virginia Department of  
Environmental Protection

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E. Scott Pruitt  
Administrator  
United States Environmental  
Protection Agency